In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 836

TROY V. POST, JR., BILL M. ALLEN, and LEROY W. PICKETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of conspiracy and twelve counts of mail fraud arising from their promotion and sale of memberships in the Lakewood Country Club in Rockville, Maryland.[1] Petitioner Post was sentenced pursuant

[1] The jury acquitted petitioners on four counts of mail fraud. Three counts were dismissed at the close of the government's case.

to 18 U.S.C. 3651 to concurrent terms of sixteen to forty-eight months imprisonment, with only six months of the sentence to be served in prison and the remainder suspended, and petitioners Allen and Pickett were similarly sentenced to concurrent terms of twelve to thirty-six months' imprisonment, of which only four months were to be served in prison. Each petitioner was also placed on five years' probation, to run concurrently with the prison terms. The court of appeals affirmed (Pet. App. A).

The evidence is set forth in detail in the lengthy opinion of the court below (Pet. 3a-6a), on which we rely. The opinion below amply refutes petitioners' contentions that the "promoter" instruction given by the trial judge detracted from the burden of proof (Pet. 17a-21a) and that the judge erred in declining petitioners' offer of proof concerning the return of certain monies to the Lakewood Country Club from a corporation to which petitioners had improperly diverted the funds (Pet. 7a-9a, 12a-14a).[2]

Petitioners also claim error in the giving of the "Allen" charge (*Allen* v. *United States*, 164 U.S. 492) when, after some fourteen or fifteen hours of deliberation,[3] the jury indicated it was deadlocked.

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[2] The return of the money occurred at a time when petitioners' relationship to Lakewood Country Club had terminated and there was no showing that they played any part in retrieving the funds (Pet. 13a at note 40).

[3] The trial had lasted for thirty-four days over a period of seven weeks. Voluminous evidence had been introduced by both sides, including more than 300 exhibits available to be read in the jury room.

The charge given is set forth at Pet. 9-10. The court of appeals sustained this aspect of the case on the basis of its prior holding in *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934. Pet. 3a, note 3. As the decision in *Fulwood* pointed out, the "Allen" charge has been approved by all the courts of appeals which have considered the question. See 369 F. 2d at 961-962. The argument that the charge is inherently coercive is refuted by the carefully balanced language of the instruction which admonishes no juror to surrender a conclusion conscientiously held. Moreover, in this case the jury was permitted to recess and separate for the night after receiving the instruction, thus reducing any possible coercive effect. The fact that the jury resumed deliberations at 9:15 the following morning, but did not reach a verdict until 3:15 p.m., further indicates that the jurors were not "coerced."

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1969.